Petition

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MELVIN E. MANN and JOHN MICHAEL MANN,
Petitioners,

v.

FEDERAL CROP INSURANCE CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether government representations to peanut farmers of the applicability of certain insurance loss valuation policies warrant estoppel of the Federal Crop Insurance Corporation in light of ambiguous regulations and subsequent changes made to the method of indemnity calculation for purposes of clarification.

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PRAYER FOR WRIT

Petitioners, Melvin E. Mann and John Michael Mann, pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit rendered in this case on June 20, 1983.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, 710 F.2d 144 (4th Cir. 1983), appears in Appendix A. The unreported opinion of the United States District Court for the Eastern District of Virginia appears in Appendix B. Jurisdiction in the District Court was invoked under 7 U.S.C. § 1506(d).

JURISDICTION

The opinion of the United States Court of Appeals for the Fourth Circuit was rendered on June 20, 1983. A timely petition for rehearing was denied on July 25, 1983, and this Petition for Writ of Certiorari was filed within 90 days from the same date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

REGULATIONS INVOLVED

The portion of 1980 Peanut Crop Insurance Policy relating to claims for indemnity, as set forth in 7 C.F.R. § 425.7(d)(B)(8). (This regulation is set out in Appendix C.)

STATEMENT OF FACTS

Melvin E. Mann and John Michael Mann, peanut farmers, suffered drastic losses during 1980 amounting to nearly 70% of their normal crop yield. The Manns filed insurance indemnity claims with the Federal Crop Insurance Corporation (FCIC) totalling over $100,000 but received only $29,123.52.

The difference resulted from the FCIC's reducing indemnity payments by the 40 cents per pound premium that the Manns had received at the time of sale. Premiums, the amount by which the market price for peanuts exceeds support price (which was approximately 22 cents per pound), became prevalent late in 1980 as buyers competed for the diminished peanut supply resulting from widespread drought.

In prior years the FCIC had ignored smaller premiums (in the range of 2 to 6 cents) when calculating indemnity claims. FCIC representatives had always instructed the Manns and other farmers not to report these premiums on their grade sheets. The FCIC changed its policy only after the conclusion of

the 1980 crop year and after its representatives had informed the Manns and other farmers that its prior policy of not counting premiums would remain in effect.

The peanut crop insurance policy is silent on the subject of premiums. It is also admitted that the FCIC issued no policy directives clarifying treatment of premiums in indemnity claims.

The Manns knew before harvesting was completed that they would have insurance losses. They also understood that FCIC's treatment of premiums would be determinative of the amount of their indemnity payment. Faced with an insurance loss for the first time, however, the Manns realized that their practice storing their peanuts in hopes of obtaining a higher premium was futile if the revenue from premiums only served to reduce the amount of indemnity the FCIC would pay.

To resolve the issue of bonus treatment, the Manns contacted both their FCIC field supervisor and FCIC sales representative, who in turn checked with the FCIC District Director. Each time the FCIC officials notified the Manns that premiums would continue not being counted against their indemnity payments.

Relying on these FCIC representations, the Manns did not have their production valued until time of sale in January of 1981. Not all of the production was sold—some was retained for seed. Although the sold and seed peanuts were identical, the FCIC reached two widely disparate valuations. Seed peanuts were valued at 22 cents per pound (support price), while sold peanuts were valued nearly three times greater, at sixty-two cents (support price plus premium).

For crop year 1981 the FCIC reversed its valuation policy so that premiums were again excluded. The FCIC made this change after explicitly recognizing the confusion that had resulted from its variation in interpretation of the 1980 policy. The FCIC concluded that this change for 1981 would make the policy much clearer.

When the FCIC refused to pay the full amount of indemnity claimed, the Manns filed a complaint in the United States District Court for the Eastern District of Virginia, which ordered the FCIC to return the amount withheld. The Court of Appeals then reversed, finding that the Manns were charged with knowledge of FCIC's clear and explicit valuation regulations. It is for review of that opinion that the Manns seek a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

1. There is a need for recognition that the rule of *FCIC* v. *Merrill* against estoppel is inapplicable to cases involving ambiguous regulations.

The rule of *FCIC* v. *Merrill*, 332 U.S. 380, 68 S.Ct. 1, 92 L.Ed. 10 (1947), has long been applied to prevent estoppel of the federal government in situations where an official erroneously interprets a federal statute or regulation. However, the Court of Appeals below and other courts overlook the *Merrill* prerequisite that only an explicit regulation warrants not applying the principles of estoppel to the government.

To reduce the "considerable ferment" [1] resulting from the repeated questioning by the Circuit Courts

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[1] *Schweiker* v. *Hansen*, 450 U.S. 785, 791, 101 S.Ct. 1468, 1472, 67 L.Ed.2d 685, 691 (1981) (per curiam) (Marshall, J., dissenting).

of what factors justify estoppel of the government, this Court should clarify the circumstances when application of the *Merrill* rule is unwarranted.

In *Merrill* respondents sought to estop the FCIC for its agent's representations that spring wheat being planted was insurable. The regulations in question clearly precluded coverage for spring wheat reseeded on winter wheat acreage, precisely what Merrill and others had done. The explicit language of this particular regulation convinced the Court to deny insurance coverage despite its recognition that Merrill could have recovered against a private insurance company for the same misrepresentation.

The decision of the Seventh Circuit in *Portmann* v. *United States*, 674 F.2d 1155 (7th Cir. 1982) emphasizes the distinction between explicit and ambiguous regulations in the context of government estoppel. In this case the postal service erroneously represented to Portmann that her package was insured up to $50,000. This was in contravention of postal service regulations defining the parameters of package insurance and limiting indemnity to $500.

The Court based its conclusion that the regulation in question was anything but explicit, in stark contrast to the *Merrill* regulation, on several grounds. First, an independent examination of the regulation would have led Portmann to assume that the postal clerk's representation on coverage was correct. Second, the postal service admitted that it amended its regulations subsequent to Portmann's filing suit "to clarify insurance coverage and improve customer understanding and administration of insurance claims." 674 F.2d at 1163, n.25. These were the key distinguishing factors the Court applied in refusing to fol-

low *Merrill* and conclude that the government could not be estopped.

The decision of the Fifth Circuit in *Foreman* v. *Prudential Insurance Co.*, 657 F.2d 717 (5th Cir. 1981) draws the further distinction between a clearly erroneous regulatory interpretation and one that is reasonable. For four years the Army had interpreted statutory insurance coverage to apply to enlistees prior to their going on active duty. The Court held that the government was bound to grant coverage to beneficiaries of two enlistees not yet on active duty after having made a reasonable, not erroneous interpretation of the regulation.

As the Seventh Circuit said in *Woodstock/Kenosha Health Center* v. *Schweiker*, 713 F.2d 285, 291 (7th Cir. 1983):

> "It is one thing to make an exception and estop the government on behalf of a person dealing with the government on an infrequent basis faced with the interpretation of ambiguous rules and regulations."

In the absence of an explicitly clear regulation, the Court of Appeals erred in applying *Merrill* to deny estoppel of the FCIC, particularly in light of the past FCIC practice of ignoring premiums.

2. This Court should decide whether inconsistent governmental regulatory interpretations and subsequent modifications are relevant to the determination of applicability of estoppel.

The FCIC's application of its regulations to reach two widely disparate valuations of the same peanuts is relevant to determining whether an estoppel should lie against the government. Subsequent regulatory interpretations made in interests of clarification should similarly be considered in determining whether

the regulation in its prior form was sufficiently explicit to give those affected notice of its content.

The regulations provide as follows for valuation:

> (1) Threshed production which has been sold shall be valued at the gross receipt or fair market value (as determined by the Corporation) taking into consideration the average quota support price.
>
> (2) Unthreshed, unharvested or threshed but not sold production shall be valued at the fair market value (as determined by the Corporation) taking into consideration the average quota support price.

7 C.F.R. § 425.7(d)(B)(8)(c)(1) and (2).

In 1980 the FCIC valued unsold peanuts at support price (22 cents). Since the valuation standard for unsold peanuts was fair market value, the FCIC approved its prior policy interpretation that support price and fair market value were one and the same.

Peanuts that were sold were valued at 62 cents on a "gross receipt or fair market value" regulatory standard. The same basis applied to unsold peanuts of making support price the equivalent to fair market value logically should also have been applicable for peanuts sold. This, however, was not the case.

Instead, the FCIC included the premium paid to farmers in its determination of valuation. The irrational result adopted by the FCIC is that fair market value depends on whether a particular peanut went to market. This is contrary to all concepts of fair market value. Once a market is demonstrated and a price established, a particular commodity is possessed of a fair market value. If such a value

changes, it will change for all units in a particular class, not just those units sold.

Moreover, the FCIC regulation addressing the "value of total production" for peanuts disposed of without FCIC inspection and grading belies the agency's assertion of consistent valuation practices. Peanuts sold under these circumstances *shall be* valued at support price only. 7 C.F.R. § 425.7(d)(B)(8)(e). This regulation is obviously in conflict with FCIC's other valuation regulations, resulting in inequitable treatment to farmers who have their crops inspected and graded.

Given the inherent inconsistencies in its own policy interpretations, the FCIC can hardly expect or allege that the Manns should be charged with knowledge of how these valuation regulations were to operate.

This is precisely the message conveyed in *Portmann* v. *United States*, *supra*. The court there acknowledged that estoppel of the government was not precluded by an official's erroneous representation of a regulation that might reasonably be misinterpreted by a layman.

Similarly, in *Broad Avenue Laundry and Tailoring* v. *United States*, 681 F.2d 746 (Ct. Cl. 1982), the court recognized the availability of government estoppel where a regulation is so unclear that a layman would be unable to ascertain that the government official's interpretation of the regulation is in error.

This rationale for permitting governmental estoppel is further advanced by the decision in *Community Health Services of Crawford County, Inc.* v. *Califano*, 698 F.2d 615 (3rd Cir. 1983). There the court found that Community Health Services lacked any independent means for resolving an issue of offsets against

reimbursable Medicaid costs. Consequently, the misinformation on offsets supplied by the government's agent was held sufficient to constitute an estoppel.

Policy inconsistencies and ambiguities are also evidenced by subsequent regulatory changes made in interests of clarifying recognized ambiguities. By acknowledging that a modified regulation is much clearer, the government tacitly admits that the regulation in its prior form was anything but explicit. *Portmann* v. *United States, supra.*

By changing valuation for the 1981 crop year in its admitted efforts to have a policy that was "much clearer", the FCIC certainly was aware that its 1980 interpretations of valuation issues were inexplicit and not understood by laymen farmers.

This recognition coupled with the FCIC's inconsistent application of regulatory valuation standards make this case a proper one for consideration of governmental estoppel.

3. The necessity of affirmative misconduct as a prerequisite for all cases of government estoppel deserves reconsideration.

The most recent pronouncements on estoppel by this Court have emphasized the necessity of a showing of affirmative misconduct. *Immigration and Naturalization Service* v. *Miranda*, —— U.S. ——, 103 S.Ct. 281, 74 L.Ed.2d 12 (1982); *Schweiker* v. *Hansen*, 450 U.S. 785, 101 S.Ct. 1468, 67 L.Ed.2d 685 (1981).

In *Hansen* this Court emphasized that the regulation in question requiring applications for benefits to be in writing was explicit. *Miranda* involved no particular regulation. When a regulation is ambiguous, the necessity for affirmative misconduct disappears,

since an official can hardly be said to be acting in contravention of an unclear regulation.

Once there is a determination of ambiguity, the structure for resolving estoppel changes. The requisite affirmative misconduct exists in the form of the government's adherence to unclear regulations.

In the absence of a decision of this Court requiring affirmative misconduct when an unclear regulation is at issue, the standards for estoppel of the federal government will continue to remain shrouded.

CONCLUSION

The decision of the Court of Appeals fails to address issues of estoppel in the context of ambiguous regulations unlike those in *Merrill*. With the increasing number of judicial opinions addressing applicability of estoppel to the federal government, including the opinion below, there is a need for clarifying distinctions between government estoppel and estoppel of private entities and resolving the necessity of affirmative misconduct where regulations are inconsistent or ambiguous. A Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 82-1828

MELVIN E. MANN and JOHN MICHAEL MANN,
Appellees,

v.

FEDERAL CROP INSURANCE CORPORATION,
Appellant.

Appeal from the United States District Court
for the Eastern District of Virginia, at Norfolk
Richard B. Kellam, District Judge

Argued: March 8, 1983 Decided: June 20, 1983

Before RUSSELL, WIDENER and
CHAPMAN, Circuit Judges

Freddi Lipstein, Appellate Staff, Civil Division, Dept. of Justice (J. Paul McGrath, Assistant Attorney General, Elsie L. Munsell, United States Attorney, James A. Metcalfe, Assistant United States Attorney, William Kanter, Appellate Staff, Civil Division, Dept. of Justice on brief) for Appellant; Joseph A. Leafe

(Willcox, Savage, Dickson, Hollis & Eley, P.C.; J. Samuel Glasscock, Glasscock, Gardy & Savage on brief) for Appellees.

CHAPMAN, Circuit Judge:

This appeal presents a question of construction of a Federal Crop Insurance Corporation (FCIC or Corporation) policy. The district court found that the plaintiffs were due $84,062.80 with interest under the policy; however, the parties agree that $76,797.58 is the maximum amount recoverable. We find that the FCIC interpreted the policy correctly and reverse the court's judgment.

I

Because of extreme drought, the crop year 1980 produced inferior crop yields for most peanut farmers, plaintiffs included. Melvin Mann and John Mann usually harvested 3600 to 3900 pounds per acre, but their yield in 1980 was only 1141 pounds per acre for their 342.3 acres (390,629 pounds total). As expected, the scarcity of peanuts produced rapid escalation in market price, causing the market price to grossly exceed the support price.

While most peanut farmers must sell their crop in the fall, immediately after completion of the threshing process, the Manns have constructed storage bins to allow them to store their peanuts in the hope of obtaining a better price. In December 1980, the Manns obtained an extension of time to file their insurance claim with the FCIC. In January 1981, they sold 216,636 pounds of their peanuts, retaining 173,993 pounds for seed, to the Hubbard Peanut Company for the support price (.226 cents per pound)

plus forty cents per pound (approximately 62 cents per pound total). On this sale, the Manns realized $84,062.80 above the support price.

When the plaintiffs submitted their claim to the FCIC, they failed to deduct the proceeds received above the support price.[1] This present dispute has arisen because the FCIC maintains that the insurance coverage is for a dollar amount on each unit of peanuts insured, and any profits above the support price must be set off against the insurance proceeds. The plaintiffs maintain, however, that the excess amount represents a "seed and drayage bonus" rendered for extra services and care provided by the farmer. The Manns submit that, in the past, FCIC has not counted this bonus against the insurance proceeds and that certain agents of FCIC represented to plaintiffs that this practice of not reducing insurance proceeds by the bonus would continue in 1980.

The trial court found that plaintiffs incurred the expense of storage, additional insurance and labor costs, and assumed the risk of loss from damage to the peanuts during storage.[2] Further, the court

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[1] The Manns failed to deduct an amount of $76,797.58. There is a discrepancy of $7,265.22 between the amount received and awarded, $84,062.80, and the amount in dispute, $76,797.58. This discrepancy arises because the peanuts are insured, and the insurance computed against, separate units, not the entire acreage. 7 C.F.R. § 425.7(d)(8)(b) (1980). On one unit, Unit 7, the Manns actually received $7,265.22 more than the insurance coverage on the unit. This amount is recognized by both parties as profit, but because the insurance is computed on each unit separately, it is not charged against the coverage on other units where losses were sustained.

[2] Crop insurance does not cover the peanuts after they are removed from the field and placed in storage.

found that to allow the FCIC to count the "bonus" against the fair market value of the crop would be to allow the corporation to act inconsistently with its previous practices and rulings, thereby allowing the FCIC to be unjustly enriched while the farmer bore the risk of loss. The court awarded plaintiffs $84,062.80 plus interest from January 29, 1981.

The FCIC has appealed this judgment making the argument that: (a) the amount received by plaintiffs over the support price is not a "bonus" in keeping with its past practices, rather it is a profit, and (b) the purpose of the FCIC is to create a stable marketplace by insuring at the support price, thereby the FCIC insures against loss. It does not insure a farmer's profits.

II

The policy issued by the FCIC guarantees the farmer he will get a certain dollar amount from his crop. The amount is the "applicable pounds of peanuts per acre multiplied by the average quota support price per pound for the insured type of peanuts for the crop year . . . ." 7 C.F.R. § 425.7(d)(4)(a) (1980). For the Manns, this dollar amount was $553 per acre, or $189,291.90 total insurance. The dispute in this case, however, is not over the total amount of insurance; it is over the valuation of the peanuts actually sold.[3] That is because the value of the peanuts produced is charged against the amount of insurance to be paid. 7 C.F.R. § 425.7(d)(8)(b) (1980).

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[3] Both the Manns and the FCIC valued the 173,993 pounds of peanuts retained for seed at the support price. 7 C.F.R. § 425.7(d)(8)(c)(2) (1980). This dispute is relegated solely to the valuation of the 216,636 pounds of peanuts actually sold.

The plaintiffs argue, and the FCIC admits, that in years past the Corporation has not counted in its computation of loss a "seed and drayage bonus." This bonus has always consisted of a payment of two to six cents above support price for seed peanuts. The reason the "bonus" was not figured in the calculations was because it was a payment for the process of culling, cleaning, storing and hauling the seed peanuts. The Corporation also admits that if the Manns had claimed the normal two to six cent bonus, it would not have been charged this amount against their insurance payment. However, the Manns have claimed that the forty cent payment they received above the support price is a "seed and drayage bonus", and should not be used to reduce the amount paid them under the crop insurance.

The FCIC submits that the forty cent payment is not the usual bonus, rather it represents the fair market value of the peanuts in an abnormal market. It is the Corporation's position that the Manns have attempted to take advantage of the unusual market to secure a large profit; the evidence bears out the FCIC's argument.

This case turns on the proper method of valuation of the harvested peanut crop under a federal crop insurance policy. Under the regulations, there are two methods of valuation, 7 C.F.R. § 425.7(d)(8)(c)(1) and (c)(2). Subsection (c)(1) provides that "[t]hreshed production which has been sold shall be valued at the gross receipt or the fair market value (as determined by the Corporation) taking into consideration the average quota support price." The valulation of "threshed but not sold" peanuts is controlled by subsection (c)(2) and it provides that they "shall be valued at the fair market value (as

determined by the Corporation) taking into consideration the average quota support price."

The plaintiffs argue that all their peanuts should be valued at support price because that was the value when they were harvested, threshed and stored and because the bonus is for storage, drayage and other services; therefore, the bonus does not reflect the fair market value. FCIC maintains that the peanuts that were threshed and sold should be valued at the gross receipt because that is the true indication of fair market value. For the reasons stated below, we agree with the FCIC.

First, the market in 1980 was unusual because of extreme crop failure. This led to an inflated market unlike that of any previous year. The chief of contract development for the FCIC testified that over 1000 claims had to be recomputed and insurance proceeds reduced because farmers had failed to include these inflated profits when making their claims to crop insurance. In a freak market, such as this, the best indication of fair market value is the gross receipt.

Second, the purpose of the FCIC is to insure a stable ground floor for the price[4] of a commodity, thereby protecting farmers against loss resulting from unavoidable causes such as drought. 7 U.S.C.

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[4] The insured price is the support price. In 1980 the market price exceeded the support price nationwide for the first time. In a "down market", when the market price is less than the support price, the farmer receives the average support price from the Department of Agriculture under the support price program. The FCIC indemnity in a down market is reduced because it takes into account the fact that the farmer receives the support price.

§ 1508(a). It was not the intent of Congress to insure profits, but to prevent disastrous losses.

Third, the FCIC used nationwide the gross receipt method of valuation provided for in the policy and the regulations. Even if it were not an accurate reflection of the fair market value, it is what is called for under the regulations and the policy.

Fourth, while the Corporation had not counted a "seed and drayage bonus" in other years, the amount in dispute here is not such a "bonus". Harvey J. Hubbard, Jr., the purchaser of Mann's peanuts, testified that the price he paid for the peanuts did not include a "bonus" or premium for services, rather it reflected the going market rate for peanuts. The receipt from the sale has no notation regarding a bonus for seed or drayage.

We therefore find that the valuation by the FCIC under 7 C.F.R. § 425.7(d)(8)(c)(1) at the gross receipt was the proper method of valuation. Thus, the Manns were due $29,123.52 under their FCIC policy. This amount, according to the record, has already been paid.

III

The Manns have argued that if we were to find adversely to them on the issue of valuation, they should still prevail because the FCIC is estopped from deducting the forty cents per pound from the policy amount.

Their estoppel argument is based upon statements by an FCIC insurance agent and field adjustment supervisor. The Manns state, and the FCIC agrees, that these men told the Manns that "bonuses" would not be counted in 1980. These agents testified at

trial, however, that their statements were made before the surge in the market price and that they both were referring to the "seed and drayage bonus" for services that had not been counted in the past, not a forty cent profit due to abnormal market conditions.

An agent of the FCIC could not extend crop insurance where there was none because the doctrine of estoppel cannot extend the coverage beyond that authorized by Congress and the rules promulgated by the FCIC. *FCIC v. Merrill*, 332 U.S. 380 (1947). The regulations and the policy stated that the threshed and sold crop is to be valued at gross receipt or fair market value. The FCIC valued the crop according to the explicit language of the regulations and policy and the valuation was not contrary to past practices and policies of the agency. The farmer is charged with knowledge of the regulation and the policy; the doctrine of estoppel cannot be used to expand the coverage. 332 U.S. at 384-385.

IV

The Manns received the $29,123.52 they were entitled to under the terms of their policy and the regulations. Because the policy coverage could not be extended by estoppel and because the FCIC used the proper method of valuation, we find that the plaintiffs have received all that is due them; accordingly, we reverse the judgment of the district court.

REVERSED.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 82-1828

MELVIN E. MANN, *et al.*,
Appellees,

versus

FEDERAL CROP INSURANCE CORPORATION,
Appellant.

[Filed Jul. 25, 1983]

ORDER

Upon consideration of the appellees' petition for rehearing, by counsel,

IT IS ORDERED that the petition for rehearing is DENIED.

Entered at the direction of Judge Chapman for a panel consisting of Judge Russell, Judge Widener, and Judge Chapman.

For the Court,

/s/ William K. Slate, II
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action No. 81-1061-N

MELVIN E. MANN and JOHN MICHAEL MANN,
Plaintiffs,

v.

FEDERAL CROP INSURANCE CORPORATION,
Defendant.

MEMORANDUM OPINION AND ORDER

Melvin E. Mann and his son John Michael Mann, plaintiffs, had seven units of peanut crops insured by the Federal Crop Insurance Corporation (FCIC) for the 1980 crop year. The insurance contract is set out in 7 C.F.R. Part 425 (1980).

The insurance coverage under the insurance agreement began at time of planting and extended to time of harvesting, that is, up to time the crop was removed from the ground. Because of the summer drouth, the production was poor. Most of the farmers covered by the insurance agreements—in fact most peanut farmers—at time of harvesting their peanuts deliver them from the field to the peanut buyer at the peanut plant. The quantity is then quickly determined and the loss immediately established. Claim is filed and settlement made. Some few farmers preferred to hold their peanuts for varying periods and to select portions for use as seed, as

well as a hope for a better price. By so doing, they at times received some increase in price per bushel, referred to in the trade as a bonus. When the peanuts are held for the hope of obtaining the bonus, in submitting claim to the defendant, the claim was always calculated on the price per bushel—as support price—at time of harvesting, and the sum received above it was considered as a bonus or compensation to the farmer for the storage, etc.

Plaintiffs in this case had constructed expensive storage bins for such storage of the peanuts produced by them. For several years past they had stored the peanuts raised by them in hope and anticipation of a better price. Their claims had always been settled on the price at time of harvesting as the support price. Since the insurance issued by defendant did not cover the safety of the crop after it left the vine, the plaintiffs ran the risk of loss by fire, water, weather or other hazards. They purchased insurance at their expense to protect against some but not all of these hazards. They also lost the use of the proceeds from the sale of the crop and, as a result, had to borrow money to carry on their business, paying a high interest rate.

Inquiry was made of defendant's agents as to whether for the crop in question, the procedure of former years of permitting the farmer who chose to store and hold his crop for a few weeks and who might thereby get a better price to have his claim calculated on the basis of harvesting time price with the increased price to go to him as a bonus would be followed for the year in question. It is agreed that plaintiffs were advised this same procedure would be followed. Relying on this, plaintiffs applied for and

were granted an extension of time within which to file their claim, because regulations required the claim to be filed before the end of the calendar year. Plaintiffs filed their claim with the FCIC for a loss under the contract in January of 1981. Therein they computed their loss using the support price as the market price at time of harvesting. They therefore did not include therein $64,335.20 in the case of Melvin Mann, and $19,727.60 in the case of John M. Mann and Melvin Mann, a total of $84,062.80, which they had received from sale of their crop after a period of storage, which was above the total amount due on the basis of the price at time of harvesting. The FCIC recalculated plaintiffs' loss and indemnity by adding said amount as part of the value of production and paid plaintiffs their indemnity accordingly.

On October 30, 1981, plaintiffs filed suit seeking to recover the sum which was due at time of harvesting under the contract of indemnity. Depositions were taken of the plaintiffs and of FCIC District Director Wallace Harrell and a motion for summary judgment was filed by defendant on May 19, 1982, with supporting documents and briefs. Plaintiffs filed their response on June 1, 1982. The case was tried to the Court June 17, 1982, argued by counsel, and thereafter each side submitted post-trial briefs.

I.

The basic facts establish that the peanut crop for 1980 was extremely short and production per acre very poor. On November 5, 1980, plaintiffs gave notice of loss to Aubrey Lankford, an insurance agent and agent for the FCIC in the sale of insurance contracts and in receiving notice of loss. Lankford in-

formed plaintiffs that so-called bonuses (or premiums or commissions) would not be included in any valuation of production in computing the indemnity. At the time of the notice of loss, it was unclear what plaintiffs' loss would be because the crop had not then been delivered to the buyer and the quantity of bushels calculated. Plaintiffs did not at that time close or adjust their claims. Later, in December of 1980, and after plaintiffs had stored their crop, Miles Carr, an FCIC Field Supervisor, explained that bonuses would not be included in the computation of claims. However, by either late December or early January, plaintiffs learned that the policy was changing and that such so-called bonuses would be counted. As set out above, plaintiffs requested an extension of time to fill out the final claim in order to delay their marketing until January as they wanted to get germination tests back in order to determine the value of their crop.

Carr's testimony basically supported Harrell's testimony as to the history of bonuses. Carr said that prior to 1980 bonuses with which he was familiar related to drayage or seed contracts, drayage being an additional payment above support price for an additional service of storing peanuts, delivering them to a buyer or taking peanuts to a distant station, and seed bonuses being additional payments made for additional services required for seed peanuts. Harrell stated that it is most unusual to settle a crop loss while it was in storage, but that the claim was usually settled after the sale so that the exact quantity could be determined rather than an educated estimate.

In January of 1980, plaintiffs entered into a sale agreement with H. J. Hubbard of Hubbard Peanut

Company. The contract called for payment to plaintiffs of support price plus forty cents per pound. Immediate payment was made upon delivery of the MQ-94s (the USDA Inspection Certificate and Sales Memorandum prepared at the buying station), while later payments would be paid after the MQ-94s had been totalled and the average support price based on the average grade had been computed. Plaintiffs maintain that an increase over price support in the value of their peanuts was due to services provided by plaintiffs in storing, protecting, recleaning, grading and delivering. Defendant says that the sum received reflected the market price. Plaintiffs assert that the cost of storage, insurance, risk, delay in receiving the funds from the crop, cost of services in protecting, grading and recleaning the peanuts resulted in a higher grade of peanut which brought a higher value. Plaintiffs further say that by increased services and by taking the risk of holding the peanuts longer, they were able to take advantage of market factors which resulted in getting the better price.

Plaintiffs delivered their crop to the buyer on or about January 27, 1981. As discussed earlier, the plaintiffs knew by that time that the FCIC had said it would include any bonus in the computation of their loss. On or about January 29, 1981, plaintiffs submitted their claims to the FCIC adjustors, Gene Edwards and Jerry Rice, but did not include in their value of production the $84,062.84 above support price received.

II.

It is plaintiffs' contention that the increase in price as paid by buyers to them for the sale of their 1980 crop should not have been included in the FCIC's determination of their crop's production value.

Value of production is determined either under § 8(c)(1) or § 8(c)(2) of the policy. Section 8(c)(1) provides that threshed production which has been sold shall be valued at the gross receipt or the fair market value (as determined by the Corporation), taking into consideration the average quota support price. Section 8(c)(2) says that threshed production not sold shall be valued at the fair market value (as determined by the Corporation), taking into consideration the average quota support price.

It is evident that nothing in the policy ever addressed the issue of how so-called bonuses should be handled, nor was the issue addressed in a directive from the FCIC. Rather, it is undisputed that in this area bonuses had never been counted in the past and that such a representation was made to plaintiffs.

The Supreme Court has recognized that the weight of an administrative remedy will depend in part upon its consistency with earlier and later pronouncements of an agency. *See Morton* v. *Ruiz*, 94 S.Ct. 1055 (1974). In the instant case, the FCIC's admittedly inconsistent posture belies its present assertion that bonuses are now to be included in the valuation of production. Due to representations by Lankford and Carr and from the previous history of claims always being settled on the price at the time of harvesting, plaintiffs had every reason to believe that the bonuses would not be counted, and that the price used for adjustment of the claim would be the price at time of harvesting. To deny recovery calculated on the market price at time of harvesting would not only be inconsistent with previous practice, rulings and determinations of defendant, but would mean that plaintiffs stored and handled the peanuts at their

own risk and expense so as to reduce the liability of the FCIC, which in effect amounts to unjust enrichment. As mentioned earlier, plaintiffs incurred the expense of storage, insurance, labor, and ran the risk of damage to the peanuts by hazards not insured against. Also, plaintiffs were without the proceeds of their crop and had to borrow at high interest rates.

Not to calculate the loss at the time it occurred, namely, harvesting, is inconsistent with the previous history of FCIC payments and with the representations by FCIC agents and because such inclusion created detriments for plaintiffs while at the same time benefiting the FCIC, it is ORDERED that plaintiffs are entitled to recover the amount of $84,062.80, with interest from January 29, 1981. The Clerk will accordingly enter judgment for plaintiffs.

/s/ Richard B. Kellam
United States District Judge

Norfolk, Virginia

July 21, 1982.

CHAPTER IV—
FEDERAL CROP INSURANCE CORPORATION

* * * *

8. CLAIM FOR INDEMNITY. (a) It shall be a condition precedent to the payment of any indemnity that the insured (1) establish the total production of peanuts on the unit and that any loss of production was directly caused by one or more of the insured causes during the insurance period for the crop year for which the indemnity is claimed and (2) furnish any other information regarding the manner and extent of loss as may be required by the Corporation.

(b) Indemnities shall be determined separately for each unit. The amount of indemnity for any unit shall be determined by (1) multiplying the insured acreage of peanuts on the unit by the applicable amount of insurance per acre, which product shall be the amount of insurance for the unit, (2) subtracting therefrom the value of the total production of peanuts to be counted for the unit, and (3) multiplying the result obtained in step (2) by the insured share: *Provided*, That if the premium computed on the insured acreage and share is more than the premium computed on the reported acreage and share, the amount of indemnity shall be computed on the insured acreage and share and then reduced proportionately.

(c) The value of the total production to be counted for a unit shall be determined by the Corporation and shall include the value of all threshed and appraised production as follows:

(1) Threshed production which has been sold shall be valued at the gross receipt or the fair market value

(as determined by the Corporation) taking into consideration the average quota support price.

(2) Unthreshed, unharvested or threshed but not sold production shall be valued at the fair market value (as determined by the Corporation) taking into consideration the average quota support price.

(3) The value of appraised production to be counted shall include (i) any appraisals made by the Corporation for potential production on harvested acres, for uninsured causes of loss, and for poor farming practices, valued at the average quota support price or fair market value (as determined by the Corporation), whichever is higher, (ii) not less than the applicable amount of insurance for any acreage which is abandoned or put to another use without prior written consent of the Corporation or damaged solely by an uninsured cause, and (iii) only the value of the production in excess of 20 percent of the amount of insurance for all other unharvested acreage.

(d) The value of the appraised potential production for acreage for which consent has been given to be put to another use shall be counted as the value of the production in determining the amount of loss under the contract. *However*, if consent is given to put acreage to another use and the Corporation determines that any such acreage (1) is not put to another use before harvest of peanuts becomes general in the county, (2) is harvested, or (3) is further damaged by an insured cause before the acreage is put to another use, the indemnity for the unit shall be determined without regard to such appraisal and consent.

(e) To enable the Corporation to determine the fair market value of any peanuts for which a United States Department of Agriculture "Inspection Certificate and Sales Memorandum" has not been issued, the Corporation shall be given the opportunity to have such peanuts inspected and graded before they are disposed of by the insured. If the insured disposes of any production without giving the Corporation the opportunity to have the peanuts inspected and graded, the value of such production shall be the average quota support price per pound for the crop year under the peanut price support program for the insured type.

Opposition

Office-Supreme Court, U.S.
FILED
DEC 30 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-674

In the Supreme Court of the United States

OCTOBER TERM, 1983

MELVIN E. MANN, ET AL., PETITIONERS

v.

FEDERAL CROP INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Crop Insurance Corporation should be estopped from considering the price for which threshed peanuts were sold in computing the indemnity due under petitioners' peanut insurance policy.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 710 F.2d 144. The memorandum opinion and order of the district court (Pet. App. 10a-16a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 20, 1983. A petition for rehearing was denied on July 25, 1983 (Pet. App. 9a). The petition for a writ of certiorari was filed on October 24,

1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

REGULATIONS INVOLVED

The pertinent provisions of the 1980 Peanut Crop Insurance Policy, 7 C.F.R. 425.7(d) (1980), are reproduced at Pet. App. 17a-19a.

STATEMENT

1. The Federal Crop Insurance Corporation (FCIC) insures peanut farmers against losses to their crops that result from certain unavoidable causes, such as severe weather conditions, wildlife damage, and disease. 7 U.S.C. 1508(a). The policy covers only losses to crops in the field, not losses that may occur after a crop is harvested (Pet. App. 3a n.2). In 1980, the FCIC Peanut Crop Insurance Policy guaranteed receipt of a specific dollar amount per acre (*id.* at 4a). In calculating the indemnity due under the policy, the value of peanuts produced was charged against the dollar amount of the guarantee. 7 C.F.R. 425.7 (d)(8)(b) (1980). The FCIC generally did not include in the value to be offset against the amount of the guarantee certain seed and drayage "bonuses" sometimes paid by buyers, which ranged from $.02 to $.06 per pound. These bonuses covered additional services, such as cleaning, seed germination tests, and hauling to a distant buyer. Pet. App. 5a.

Petitioners are peanut farmers insured by the FCIC. Their usual practice was to store the peanuts they harvested in the late fall and to sell them later in the hope of obtaining a better market price. Because of extreme drought conditions in 1980, petitioners' yield of peanuts per acre was substantially below the normal level. The peanut shortage that

year was a nationwide phenomenon and resulted in a significant rise in the market price of peanuts. Late in 1980, petitioners were able to negotiate a contract to sell their peanuts to the Hubbard Peanut Company for $.62 per pound, or $.40 more than the support price of $.22 per pound.[1] Pet. App. 2a-3a.

In November and December 1980, petitioners asked an insurance sales agent and an FCIC claims adjuster whether bonuses would be counted in computing the offset representing the value of peanuts they sold. The sales agent and the FCIC representative, assuming petitioners were referring to the seed and drayage bonuses that sometimes had been paid in the past, told petitioners that bonuses would not be counted, consistent with past practice. Pet. App. 7a-8a. During these discussions, petitioners did not mention the fact that the peanut shortage was causing the market price to rise well above the 1980 support price. See C.A. App. 68-73.

The FCIC central office subsequently became aware that the premiums peanut farmers were receiving over and above the support price on the sale of their peanuts actually reflected an increase in the market value of peanuts, rather than seed and drayage bonuses. At that point, the central office established a uniform policy of including the market premiums in computing the value of threshed and sold peanuts that was to be offset against the amount due under the insurance policy. See Pet. App. 6a; C.A. App. 118-119. Petitioners knew of this central office decision by late December 1980. See *id.* at 56, 70-71. However, in late January 1981, when petitioners filed

---

[1] Under the Department of Agriculture price support program, participating farmers are guaranteed a basic support price for their peanut crops.

their claims for indemnity for their loss in yield due to drought, they deducted an amount that reflected only the support price of the peanuts they had sold to Hubbard, not the $.40 market premium they had also received. In March 1981, the FCIC advised petitioners that market premiums must be included in computing the value received for sold peanuts; it then recomputed the claims and paid petitioners $29,123.52 (rather than the amount in excess of $100,000 claimed by petitioners). Pet. App. 12a; C.A. App. 9-10, 57.

2. Petitioners filed suit against the FCIC in the United States District Court for the Eastern District of Virginia, claiming the sum of $100,000. That sum represented the disputed amount of their insurance claims plus an amount for the inconvenience they allegedly suffered as a result of the FCIC's actions (Apr. 15, 1982 Deposition of Melvin Mann 45). The district court held a one-day hearing, during which the owner of the Hubbard Peanut Company testified that the $.40 premium over the support price he had paid to petitioners did not cover any services, but reflected only the high market price of peanuts. Pet. App. 7a, 12a. The district court nevertheless concluded that the market premium petitioners received from Hubbard was equivalent to the seed and drayage bonuses the FCIC had previously omitted from the computation of value. The court concluded that petitioners should recover the full amount of insurance they claimed on the ground that the FCIC's decision to include the 1980 market premium as part of the value of threshed and sold peanuts was inconsistent with its past practice and with the advice FCIC representatives had given to petitioners. *Id.* at 10a-16a.

3. The court of appeals reversed (Pet. App. 1a-8a). It concluded that FCIC's use of gross receipt (*i.e.*, the total amount petitioners received from Hubbard for their peanuts) was the proper method of valuation for sold peanuts, because it was the best indication of fair market value in the "freak market" of 1980, because Congress intended the FCIC program to prevent disastrous losses rather than to insure profits, because the gross receipt method of valuation was called for by the policy and regulations, and because the record showed that the market premium at issue in this case did not constitute a seed and drayage bonus, but instead reflected the going market rate for peanuts (*id.* at 6a-7a).

The court of appeals also rejected petitioners' contention that the FCIC should be estopped from deducting the amount of the market premium realized on the sold peanuts from the indemnity for the abnormally low yield because of statements made by FCIC representatives. The court stated that an FCIC agent could not extend crop insurance where there was none, since estoppel cannot extend coverage beyond that authorized by Congress and FCIC regulations. Pet. App. 8a (citing *FCIC* v. *Merrill*, 332 U.S. 380 (1947)). The court reiterated that valuation on the basis of gross receipt was consistent with the explicit language of the regulations and policy and was not inconsistent with the FCIC's past practices with respect to seed and drayage bonuses (Pet. App. 8a).

ARGUMENT

Petitioners no longer contend that the market premium they received from Hubbard for sale of their peanuts in fact represented a seed and drayage bonus.[2] Nor do they claim that the court of appeals erred in concluding that under applicable FCIC regulations the amount of gross receipt from that sale was the proper value to be offset against the amount of the crop insurance indemnity due them. Rather, petitioners urge only that the FCIC should be estopped from applying its regulations to them. Although the FCIC policy merely guaranteed that petitioners would receive a certain dollar amount for their peanut crop, petitioners contend that statements of FCIC representatives constitute a sufficient basis for requiring the FCIC to indemnify petitioners fully for the peanuts they did not harvest, despite the fact that they have enjoyed the benefit of abnormally high profits on the remainder of the crop because of the drought-induced shortage. That contention plainly is without merit.

1. This Court has consistently held that the federal government may not be equitably estopped, at least in the absence of serious affirmative misconduct. See, *e.g.*, *INS* v. *Miranda*, No. 82-29 (Nov. 8, 1982); *Schweiker* v. *Hansen*, 450 U.S. 785 (1981); *INS* v. *Hibi*, 414 U.S. 5, 8 (1973); *Montana* v. *Kennedy*, 366 U.S. 308, 314-315 (1961); *FCIC* v. *Merrill*, *supra*. That principle applies with special force in cases like this one, in which estoppel of the government would result in payment of federal funds contrary to the limits established by statute or regulation. The Court has made clear that courts have a

[2] Compare Pet. App. 6a with Pet. 2.

duty " 'to observe the conditions defined by Congress for charging the public treasury' " (*Schweiker* v. *Hansen*, 450 U.S. at 788 (quoting *FCIC* v. *Merrill*, 332 U.S. at 385)) and that the FCIC's regulations "limit the liability of the Government as if they had been enacted by Congress directly" (332 U.S. at 385).

Petitioners have not shown why their case warrants an exception to these well-established rules. Indeed, petitioners do not appear even to have made the sort of showing necessary to estop a private party. They do not dispute the court of appeals' conclusion (Pet. App. 7a-8a), fully supported by the record, that the individuals they consulted about treatment of bonuses believed they were referring to the small payments for services known as seed and drayage bonuses, rather than to any market premium; thus, petitioners have not shown that there was any misrepresentation by the FCIC.[3] In addition, petitioners fail to explain how they relied on the advice they received, why any such reliance should be considered reasonable in view of the plain language of the applicable regulation, or what detriment they suffered as a result of any such reliance. In fact, there appears to have been no detriment to petitioners. The FCIC guaranteed that petitioners would receive a given dollar amount for their peanut crop. Thus, regardless of whether, or when, petitioners sold the peanuts they harvested, they would have received the same total amount from their crop,

[3] In fact, petitioners themselves appear to be largely responsible for any confusion by failing to specify in their inquiries that they were referring to premiums resulting from the rise in market price. See C.A. App. 68-73.

even if they had never received advice from an FCIC representative.[4]

Assuming petitioners made the sort of showing required to estop a private party, that nevertheless would be insufficient to warrant estoppel of the government. Petitioners recognize that this Court has indicated that the government certainly may not be estopped in the absence of a showing of affirmative misconduct (Pet. 9). But in urging the Court to abandon that requirement in the circumstances of this case, they implicitly concede that they cannot show such misconduct. In any event, even if the Court were to abandon any suggestion that there might be an affirmative misconduct exception to the principle that the government may not be estopped, there would still be no reason to establish any rule that would allow petitioners to prevail in this case. Principles of equity do not require that this Court ignore valid conditions on payment of public funds under the federal crop insurance program so that petitioners may enjoy both the high windfall profits on sale of the peanuts they harvested *and* payment of the full amount of the support price for the portion of their crop that was lost.

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[4] Petitioners suggest that they would not have waited until the time of sale to have their harvested peanuts valued if they had known that sale of the peanuts at a higher price would not increase their overall recovery. See Pet. 3. But in view of petitioners' past practice of storing their peanuts in order to sell them at a higher price, it is not at all clear that they would not have made a similar choice in 1980, perhaps in the hope of recovering more than the amount of their FCIC coverage through sale of the harvested peanuts. In any event, it is unlikely that petitioners could have persuaded the FCIC to value their peanuts at a lower figure than the amount petitioners eventually received for them simply by submitting insurance claims prior to the time the sale took place.

2. Petitioners contend primarily (Pet. 4-10) that estoppel of the government should be permitted in cases involving ambiguous regulations. Even if that general proposition were correct (and we believe it is not), it would not aid petitioners in this case. Petitioners do not directly challenge the court of appeals' conclusion that the "regulations and the policy stated that the threshed and sold crop is to be valued at gross receipt or fair market value" and that the FCIC "valued the crop according to the explicit language of regulations and policy" (Pet. App. 8a). Nor do petitioners explain why they view the regulations and policy as ambiguous.

In fact, despite petitioners' vague implications, the regulations and policy that govern this case are not ambiguous or inconsistent. The regulations provided for a guaranteed dollar amount of coverage for 1980 (7 C.F.R. 425.2(a) (1980)), and the policy specified the method for valuing actual production as a step in determining the appropriate amount of indemnity (7 C.F.R. 425.7(d)(2)(b) and (c) (1980)). The policy plainly stated that "[t]hreshed production which has been sold shall be valued at the gross receipt or the fair market value (as determined by the Corporation) taking into consideration the average quota support price." 7 C.F.R. 425.7(d)(8)(c)(1) (1980). It further provided that threshed but unsold production (*e.g.*, peanuts retained for use as seed) shall be valued at "fair market value (as determined by the Corporation) taking into consideration the average quota support price." 7 C.F.R. 425.7(d)(8)(c)(2) (1980). Consistent with the plain language of the regulation, the FCIC valued the part of petitioners' production that was sold to Hubbard Peanut Company at the gross receipt, *i.e.*, the amount petitioners received from the sale.

Petitioners suggest that the FCIC's interpretations of its regulations are somehow internally inconsisttent, apparently because the FCIC valued sold peanuts at the amount of gross receipt and unsold peanuts at the support price. Petitioners cite the fact that the regulations include the term "fair market value" in connection with valuation of both sold and unsold peanuts. That fact alone might suggest that the FCIC would use the same measure of value for both types of peanuts. But the plain language of the regulations indicates that the FCIC need not use the same method of valuation for sold and unsold peanuts, since "gross receipt" is mentioned in connection only with sold peanuts. Moreover, in view of the "freak market" in 1980 (see Pet. App. 6a), it was reasonable for the FCIC to treat sold peanuts differently for purposes of valuation. Otherwise, claimants who realized very large profits on the peanuts they sold could nevertheless obtain the full support price in connection with losses due to low yield, resulting in recovery in excess of the guaranteed amount. As the court of appeals pointed out, "[i]t was not the intent of Congress to insure profits, but to prevent disastrous losses" (*id.* at 7a).[5]

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[5] Petitioners also cite (Pet. 4) a subsequent modification of the FCIC's regulations as support for their claim that the 1980 regulations were ambiguous. Petitioners apparently refer to the FCIC's decision to change the type of coverage from a guaranteed dollar amount in 1980 to a guaranteed production level in 1981. But that change did not constitute a clarification; rather, it was a switch from one type of coverage to a different type that previously had been in effect for a number of other crops. The 1981 modification, which appears to have been at least in part a response to pressure from claimants such as petitioners, cannot provide the basis for estoppel in connection with the 1980 program.

3. Petitioners cite several court of appeals cases in support of their contention that estoppel of the government may be warranted in a case involving an ambiguous regulation. See Pet. 5-6, 8-9. But the cited cases do not aid petitioners, since the regulations at issue here were not ambiguous, and since petitioners do not appear even to have made a showing that would warrant estoppel of a private party.

This Court has granted certiorari in one of the cases cited by petitioners, *Community Health Services* v. *Califano*, 698 F.2d 615 (3d Cir. 1983), cert. granted, No. 83-56 (Oct. 3, 1983). We sought certiorari in *Community Health Services* because the decision in that case cannot be reconciled with the unbroken line of this Court's decisions establishing that the government may not be estopped, at least in the absence of serious affirmative misconduct. See page 6, *supra*. There is no need for the Court to hold this case pending a decision in *Community Health Services*. As we explained above, petitioners have not demonstrated that they would be entitled to estoppel under the theory they advance or any other theory. Thus, regardless of how the Court decides *Community Health Services*, petitioners could not prevail.[6]

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[6] Like petitioners, we have questioned the utility of an "affirmative misconduct" exception to the rule against estoppel of the government. See Gov't Br. at 39-41, *Heckler* v. *Community Health Services*, No. 83-56. Our point, however, is that such an exception is inconsistent with the reasons underlying the principle that the government may not be estopped and has proved to be unsatisfactory and unworkable in practice. Petitioners make the very different contention that they should not be required to show affirmative misconduct in order to estop the government in the circumstances of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1983

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